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THE

WRIT OF HABEAS CORPUS,

AND

MR. BINNEY.

By JNO: T. MONTGOMERY.

SECOND EDITION.

PHILADELPHIA:
JOHN CAMPBELL, BOOKSELLER,
419 CHESTNUT STREET.
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The first issue of this paper was published early in February, since which time the number of replies to Mr. Binney shows the deep interest taken in the subject of personal freedom. That several of these pamphlets have passed into second editions is a favorable augury that, in the strife of the hour, the people have not forgotten their liberties. If the writer has, in the smallest measure, contributed to such a result, he will be more than satisfied.

JNO: T. MONTGOMERY.

PHILADELPHIA, *April* 8, 1862.

NOTE.—The pages referred to are those of the first edition of Mr. Binney's pamphlet, published by C. Sherman & Son.

THE

WRIT OF HABEAS CORPUS

AND

MR. BINNEY.

At a time like this, when the United States professes to be contending for the principles of Free Government under the Constitution, it is unfortunate that a gentleman of great attainments and reputation, and of an experience of rare maturity, should come from his honorable retirement to give the world his reasons for humbling from its hitherto proud position one of the dearest principles of liberty known to free institutions.

A pamphlet, entitled "The Privilege of the Writ of Habeas Corpus under the Constitution," from the pen of the Hon. Horace Binney, has been recently advertised for sale in this city, and it is proposed, with deference for the high name of the author, to review some of its errors. Although the invitation to such a criticism is confined to the gentleman* to whom the pamphlet is dedicated, and who seems, in its pages, to enjoy the rare fortune of the respect of its author, yet, as the subject is of general importance, it is the right, and perhaps the duty of each citizen, freely, without partisan bias, and with a respect for the opinions of others, to discuss it.

It is not proposed to enter on an elaborate history of the Writ of Habeas Corpus. It is not necessary to the matter in hand, and the public mind is not in a state at present to stand it; but, as the pamphlet under review has started some novelties calculated to cause uneasiness, this is offered as an humble attempt to expose some of its fallacies.

Mr. Binney begins by saying: "There are two modes of treat-"ing this matter; one of them is *the merely legal and artificial,*

* But Dr. Leiber entirely disagrees with Mr. Binney's conclusions. See Leiber's "Civil Liberty and Self-Government," Vol. I., p. 131. *Ed. Philada.*, 1853, where he says that the suspension of the Habeas Corpus "cannot be done "by the President alone, but by Congress only, *need hardly be mentioned.*"

"*the other is the Constitutional and natural.*" As to the first, he gives us an argument "against the President's power (to suspend "the privilege of the Writ) until Congress have authorized it." "This argument," he says, "it may not be easy to answer, if "the premises are admitted." This view of the subject is then dropped, without informing us in what respect the premises assumed are faulty, and without the expression of an opinion, in that context, that they are so. Indeed, it is impossible to see how these premises could be disturbed. If the learned author had raised his eyes to his well stocked book shelves, he would have found those volumes devoted to the profession which he has adorned, dedicated exclusively to the "merely legal and artificial" view of the subjects treated of. The word "artificial" is, of course, to be here understood in its primary signification, and as an equivalent for *technical.*

The Constitution of the United States is a *law*, in the highest sense of the word; it is declared, in its own language, to be "the "supreme law of the land." Any treatment of a law which discards a view which is legal and technical, is certainly a novelty, and may well, when the mode adopted leads to such conclusions, be styled a *dangerous* novelty.

To pass to the other mode, namely: "*The Constitutional and natural,*" for this is the view to the support of which the pages are dedicated. The word "Constitutional" is certainly here a term of art; it signifies that which is authorized by the Constitution—which is nothing more nor less than *legal*, and, applied to the Constitution of the United States, means only the view which the legal tribunals intrusted with the exposition of the organic law have stamped upon it, in regard to questions which have been presented for adjudication. All such questions are *Constitutional* questions. The Federal Courts have no powers but such as are derived from the Constitution, mediately through Congress, which, by the Judiciary Act of 1789, provides the mode of carrying those powers into execution. It is not easy, then, to see how these two adjectives can be properly joined. It is probable that the learned writer meant to treat the question from a *political* and natural point of view.

Taking then, the word *Constitutional*, in the sense we have applied to it, we have the two views, viz:—

1. The legal and artificial.
2. The Constitutional (*i. e.* the legal) and natural.

Striking out of the propositions, terms common to both, we have as a result—

1. The artificial view.
2. The natural view.

Under the second head, then, we are met at the outset by the assertion that the Constitution does not use the word *suspended* in an "artificial or technical sense, for it had none in this relation." Now the word "suspended" is an apt one for the purpose. It is used in the Bill of Rights of William and Mary, and recurs in the Declarations of Rights of most of the States of the Union. The framers of the Constitution were familiar with its meaning. It is also a word of daily use; there can be no mystery or misunderstanding, and lawyer and layman cannot differ about it. We need not dip deeply into the Dictionary to get light on the subject; but as this word is made to do duty—indeed, leads the advance in the attack—it is entitled, from mere position, to be looked at. What say the Dictionaries? "Suspend," in its seventh meaning, is as follows: "To cause to cease for a time "from operation or effect; as, to *suspend* the Habeas Corpus "Act." (See Dr. Webster's and the Imperial Dictionaries.) Here we have the very definition. If then, we interpret the word either by the light we have from its *technical* uses above cited, or according to its every day dictionary meaning, it is the same. It matters not how many or few acts are required to accomplish the *suspension*, but when accomplished, that of which *suspension* is predicated, (whether it be the *privilege* of the writ—the Writ, or the Habeas Corpus Act,) is "*suspended.*"

This seems to be the admitted meaning, if the expression were applied to the *Writ* or *Act;* but we are told, when the word *suspended* is applied to "the privilege of the Writ," its import is different. The distinction, if there is any, (for it is rather fine in a *natural* view of the subject,) is in support of the use of the word *privilege.* No reason is given, in this connection, for this delicate shade of difference; but on page 35, we are told: "If the clause "in the Constitution had said of the *Writ* of Habeas Corpus, or "of a Habeas Corpus Act, enacted or to be enacted, what it says "of the *privilege* of the Writ, there would have been some ground "for the argument that a Writ of Habeas Corpus and a Habeas "Corpus Act, being the work of the Legislature, the suspension "of the writ or act should be made by the Legislature also."

But the *privilege* of the writ seems to be the more correct expression. When the Constitution was framed, there was no Federal Habeas Corpus Act, none was contemplated, and none has ever been passed. The privilege was a *common law* privilege of the subject, and gained no vitality, as such, from its recognition in the Constitution. As part of the common law, and a cherished part, our ancestors brought it with them from the mother country. The sole operation of the Constitution was to affix conditions in regard to the suspension of this privilege, confining it to "cases

"of rebellion or invasion," and not then, unless the public safety should require it. This was a limitation of the powers of Congress which was thought prudent. In England, the Parliament was trammelled with no such conditions, but might, arbitrarily, at its own pleasure, suspend the privilege.

At foot of page 11 it is said:

"The Constitution uses the word *suspended* to signify one act, "by one agent or body, with one effect, consummate by one opera-"tion—imprisonment without bail, trial or discharge for a season."

And then, in the same paragragh, occurs the following:

"It is impossible to suppose that in speaking of the *privilege* of "the Writ, it meant by one act of *the law*, as if it had spoken of "the *Writ* alone, or of the Habeas Corpus *Act*."

These sentences, taken together, appear irreconcilable. "*Suspended*" is said to signify one act, while, in the phrase suspending the *privilege*, it is said to be impossible to suppose is meant that it should be accomplished by one act of *law*. Why is it necessary to suppose the operation of *suspension* to differ from that in use in England, where the word privilege is not used in this connection, because there could be no conditions applied to the absolute power of Parliament to suspend any law? The increased freedom of this country imposed conditions on the Congress, and created an occasion for the use of the word *privilege*, which in England did not exist. If the Legislature has the power to suspend the *Writ* or *Act generally*, what it may do thus, it may also do specially, and in particular cases; and the discretion as to the cases proper for the exercise of this power, the body entrusted with the control of that power, as to the *whole people*, may delegate to the discretion of the Executive for its partial and individual application; and this we are told under a "*perhaps*" at foot of page 48, while on the next page even this "*perhaps*" is destroyed by the attempted analogy drawn from the argument in the Federalist as to the pardoning power, the fallacy of which will be elsewhere shown. The argument, pp. 11-12, appears to be that our use of the word *privilege* changes the whole character of the phrase, and renders the suspension impossible for any but the Executive. This distinction must turn on the import of the word *privilege*. Now this word is defined to mean "a particular and peculiar benefit or "advantage enjoyed by a person, company, or *society*, beyond the "common advantages of other individuals."

This privilege, we are told, "is necessarily personal or indi-"vidual." But there may be a privilege which is merely personal, and one which may apply to a *class* of persons. Of these the examples are familiar. If, then, we suppose that the class of which this privilege is predicable is that of *freemen*, (and this it is

submitted is the undoubted meaning of the word in the Constitution,) the distinction attempted to be set up vanishes.

Again, Writs are not created exclusively by the Legislature. The Writ of Habeas Corpus is a common law writ—no particular form of words is indicated by the statutes which confirm the privilege of it. The power required to suspend a *common law* privilege, is of as great dignity as that required to suspend a statutory declaration of that privilege. The common law is as jealous of a departure from its principles as the statute law. Both adapt themselves to the changing vicissitudes of the people. The former noiselessly moulds itself to their wants, while unpopular statutes are either repealed in terms, or are practically so, by non-user. We have many such on our statute books that are as effectually repealed as if an act had been formally passed for the purpose. On what principle, then, can the distinction previously quoted at length between the phrases suspending the *Writ* or *Act*, and suspending *the privilege* of the writ, be sustained? The statute of Magna Charta of King John, which, according to Sir Edward Coke, has been affirmed thirty times, has, in its thirty-ninth clause, these words, an important portion being omitted by Mr. Binney:

"*Nullus liber homo capiatur, vel imprisonetur, aut dissaisiatur,*
"*aut utlagetur, aut exuletur, aut aliquo modo destruatur; nec super*
"*eum ibimus, nec super eum, mittemus, nisi per legale judicum*
"*parium suorum, vel per legem terræ.*"

No apology is necessary for their repetition. They might well (to use the words of a master) be written in letters of living light, on each page. They are the *very text* of freedom. The principle which they assert has refined the rude latinity in which it is expressed, and has consecrated the words themselves. Mr. Binney well says, "It is a glorious principle and worthy of all admiration "*like perfectness.*" Having been favored with this glimpse of the promised land, we are dashed by the assertion that, "It is too per-"fect for human society."

But, let us be of good cheer, for even Mr. Binney is not always so unhopeful. In a polemical pamphlet,* commonly attributed to him, written in 1854, in defence of one Bishop and against another, he says: "The law of every free government upon earth is "a stranger to indefinite imprisonment or restraint, at the mere "pleasure of a Judge, Governor, or King. No degree of personal "freedom is consistent with it. This, perhaps, more than any "other single abuse, has led to two revolutions—one in England,

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* "A Review of Bishop Meade's Counterstatement of the Case of Bishop H. U. Onderdonk, by a Member of the Church." *Philadelphia: C. Sherman*, 1854.

"and another in France; and the overthrow of the abuse by our "English ancestors, was worth, at least, a part of the sufferings "they encounter to prostrate it forever." These noble words contrast oddly with Mr. Binney's new ideas, and contain an agreeable antidote to their poison.

The right, then, to this great principle, is the "*privilege*" of freemen. Had the words, suspending the Writ of "Habeas Cor-"pus," or "suspending a Habeas Corpus Act," been used, it might have been asked, what act? or what writ? There was, as has been said, no Federal Habeas Corpus Act or Writ. Either of the expressions, if not insensible, would have been, at least, vague and unsatisfactory.

The term used is full and clear. Down to the present day of sudden illumination no one has ventured to disturb its meaning. That which was *not* to be suspended except in certain cases, was the *principle* of the clause in Magna Charta. This principle might or might not be embodied in an act or writ, but the *principle*, as carried by the words, no one can doubt the nature of, and the benefit of this principle was the *privilege* of freemen. The phrase, as it stands, was approved by the States, and will be found in such of their Constitutions as have been adopted since 1789.

A history of the clause is given, which is supposed to strengthen Mr. Binney's view, but a careful examination of the subject will, it is submitted, lead to an opposite result.

Mr. Pinckney, in his draft of the Constitution, submitted to the Convention on the 29th May, 1787, placed in the sixth article, which refers to the powers *of the* Legislature, these words:

"The Legislature of the United States shall pass no law on the "subject of religion; nor touching or abridging the liberty of the "press, nor shall the privilege of the Writ of Habeas Corpus ever "be suspended, except in cases of rebellion or invasion."

This clause Mr. Binney thinks obscure. He tells us, on page 26, the word *nor* renders the latter part of the sentence which relates to the suspension of the Writ *not* "relative to the Legislature." But this view is supported neither by the intention of Mr. Pinckney, nor by the grammar of the sentence. On what principle does this word *nor* work such a radical change in the phrase? Suppose that, instead of the latter part of Mr. Pinckney's clause, it had been written *nor suspending the privilege of the Writ, &c.*, there would have been no doubt that this was a legislative prohibition. The prohibition on the subjects of religion and the liberty of the press *is absolute*, while that as to the suspension is conditional, and, to avoid repetition, well warrants the words used as equivalent to the supposed phrase. To leave this nice point of grammar, we come next to the 20th of August, 1787, on which date, at least,

Mr. Pinckney relieves us of all doubt as to what he *means*, because he says:

"The privileges and benefit of the Writ of Habeas Corpus shall "be enjoyed in this Government in the most expeditious and ample "manner, and shall not be suspended *by the Legislature*, except "upon the most urgent and pressing occasions, and for a limited "time, not exceeding . . . . months."

This form of the proposition differs only from that of the 29th of May in the conditions under which the privilege of the Writ might be suspended. In regard to the branch of Government which shall exercise that power, there is no difference which can be gathered either from history or grammatical construction, between them. The various changes of phrase seem all to have been made to reconcile differences between those who, like Mr. Rutledge, thought the Writ should be inviolable, as was the case with the subjects of religion and the liberty of the press, and those who were inclined to permit its suspension only on certain conditions. Among this latter class, again, were some who favored a limitation of time, as well as conditions of fact. The former, following clearly the English Analogies by which the Crown was empowered by Parliament to imprison, without bail, certain suspected persons, until a day named in the Act. Among all these important questions, we do not find mention of any other branch than the Legislative, as possessing the power to authorize suspension, and, however brief Mr. Madison's reports may be, it is impossible to imagine that so important a question, if agitated in the Convention, would have been passed unnoticed.

What is the practical difference whether the suspension clauses were located in that article of the Constitution which treats of the Judiciary, or under that which refers to the Legislature? The issuing of the Writ, and the proceedings under it, appertain solely to the Judiciary. In one case the Legislature would have been enjoined specially by name; in the other, that branch, though omitted *by name* in the clause, is, under the operation of the polishing committees, put in the article restricting the powers of Congress to certain expressed conditions of fact; and, in this view and final location, the word *Congress* is necessarily dropped.

We are asked to infer this power to the President, because, it is said, our Executive is "the feeblest perhaps ever known in a civilized community;" and for this Mr. Bulwer Lytton and M. de Tocqueville are quoted. It would be a matter of curious inquiry, whether these gentlemen, if consulted now, would hold the same opinions. The former, at least, must have spoken under the pressure of "British "Analogies," and it is not quite consistent, at one moment, to discard these analogies, and at the next, to quote in support of the doc-

trine of power in the Executive, the opinion of one whose "British "Analogies" would have led him to exclude that power, had his attention been specially called to the subject. Theoretically, the Executive is weak, but practically, the office is stronger than that of the British Sovereign. A single familiar instance, not to go further, will show the truth of this. The Sovereign has an *absolute* veto power, while the President has a *qualified one*. This is *the theory*. In regard to the practice, Lord Macaulay, in chapter xviii. of his history, says: "Those words had been very rarely pro-"nounced before the accession of William. They have been pro-"nounced only once since his death." And also, on the same subject, the same author says, "His (William III.) successors have "suffered the veto prerogative to fall into utter desuetude."

Our Executive, as every one knows, has used the power freely—the practice has thus reversed the theory.

The opinions of foreigners are properly drawn from our written Constitution and contemporary papers, the spirit of which has, however, been for years practically violated in important particulars. The system of checks well devised to conserve the equilibrium of the departments, and to retard and refine the primary impulses of the people by transfusion through bodies supposed, by their terms of office, to be removed from such immediate influences, and to possess qualities of stability, (such as the Senate,) has been set at nought, by reducing that body to the condition of *servants* of the Legislatures of the States. In this view of their duties, their term of office is a matter of no importance whatever. If the Senate were elected for life, it would, according to the modern doctrine, be still the mere reflection of the fluctuating views of the State Legislatures—its constituency.

As to the argument offered, that because the Executive office is weak, it is, therefore, right to infer power to it, in regard to the Writ of Habeas Corpus, the induction is just the *other way*, and in this other way, the foreign authorities quoted, also lead us. If, in the examination of an organic law, we find that a particular branch of government is sedulously reduced and weakened, the inference in regard to a power supposed *not* to be specifically consigned to any branch, is, undoubtedly, *against* attributing that power to the branch which is thus confessedly enfeebled. Liberty of the person is the corner-stone of all free governments. To throw this into the hands of the Executive is to destroy, at a plunge, the value of all the less important restrictions on the powers of that office, and is as false to logic as to every sentiment of freedom.

Conceding it as probable that more was said generally than is given to us in the "Madison Papers," we cannot tell where they are silent, nor have we anything but conjecture as to the views

taken of the subjects supposed to be omitted. In the face of Mr. Madison's solemn assertion in his will, that he had a seat in front of the presiding member—noted down all that was read or spoken to the chair—that he wrote out his notes in full at the close of each day, and did not lose a single speech, as he was not absent a single day, the slur cast upon the "Madison Papers," on page 28, seems unwarrantable.

To say that much more was said than is reported, then, of what *is* reported, to say, "There is reason to doubt whether the reporter's "mind or the delegate's embraced the technical doctrine on the "subject;" that neither Mr. Madison nor Mr. Pinckney was familiar with what he was talking or writing about; and, finally, if there should be a spark of life left, to extinguish it with the remark, "The present position of the clause in the Con-"stitution is not of the least importance," is a summary mode of dealing with men and evidence of facts, and, with great respect for its source, cannot be considered an argument, or even an approach to it.

No carefully digested instrument could stand the rules of construction and analysis which have been applied to the Habeas Corpus clause. The only question should be, *What was the paper submitted to the consideration of the States?* It was the Constitution as it now stands (the amendments excepted) unaffected by what Mr. Pinckney, Mr. Rutledge, or Mr. Morris said about any part of it. What they said may be matter of curious history, but it was not intended for the public. The Convention sat with closed doors, and were relieved of the torments of reporters and eavesdroppers. Their proceedings were veiled in secrecy, and did not see the light until nearly all the actors had passed away. The Boston Journal appeared in 1819, while the "Madison Papers," the chief sources of history, did not come out until 1840. When the Convention had accomplished their noble work, it was given to the States for ratification and to the world for admiration—it was "*in seipso totus, teres atque rotundus.*" When the debates were made public, the Constitution had been for some time a practical working law for the Nation, and factious opposition, existing at earlier dates in some of the States, had subsided.

It has been reserved for recent days to disturb the plain meaning of important clauses—to weigh the vigorous phrase of the Constitution in the scales of nice verbal criticism, with, perhaps, a latent desire to tamper with the balance; to apply a rule of construction to the fair copy, which, inquiring into the various changes of phraseology and arrangement, interlineations, erasures and errors of all kinds, seeks to substitute a compound made of the rejected material for the massive structure of the master-

workmen—men of first-rate ability, whose stamp has, unfortunately, not been continued to posterity. Such a mode of dissection and analysis is not admissible, except in cases of extreme obscurity, and then only, with propriety, when those to be affected by the investigation are in some way parties to the creation of the obscurity.

The clause, as it now stands, and as it was submitted to the States, is not obscure. The eighth section of the Constitution is that which is *enabling* to Congress. It begins, "The Congress "shall have power"—then follow the various powers without the repetition of the word Congress, except in the seventeenth clause, and in it only for the sake of sense. Such a repetition would have been as unnecessary as to prefix the enacting clause to each section of a Legislative act.

The ninth section is *disabling* throughout. In its first sentence the branch of Government disabled is Congress, by name, and the word Congress occurs but once afterward, in the concluding paragraph of that section. As the eighth section is *enabling*, while the ninth is in *restraint* of the powers of *Congress*, so the tenth section expressly restrains the powers of the *States*. The word Congress is not in the Habeas Corpus restriction, and certainly it was easy to put it there, but it is as certain that the repetition of the word was dispensed with as unnecessary. To the men of that day, and to the members of the Convention, it was as impossible for the *Executive* to suspend a law as it was for that officer to make one. Mr. Binney says, "Considering the facility with which it (the word *Congress*) might have been introduced or retained, we may say it was *struck* out." This conclusion is too violent. While the prohibition was in another part of the instrument, the word "Congress" was necessary; but when it came to its final adjustment in that section which restricts the powers of Congress, the word was mere surplusage, and would naturally fall under the pruning knife of a committee on "style and arrangement."

The question, then, is said to recur to this: "Whether it re-"quires an act of the Legislature to declare that rebellion or "invasion exists in the country, and that public safety requires "a suspension of the privilege." And this is the momentous question under consideration.

Fortunately, however, for the country, we are not without direct light on this subject from the Judiciary; and, although Mr. Binney does not seem to bow to this authority, he has not given us any good reason for his refusal.

He tells us that the language of C. J. Marshall, "Whatever be "its meaning, was not used in a case which brought up the ques-

"tion." This is an objection which would have been more applicable to the *legal* than the *natural* view. It is strictly technical, and it is out of place in the connection in which it occurs. Let us look at it as it is presented, and weigh the language of the Court, of which it is said: "The Court was somewhat divided upon the "point, and the writ was issued—two judges out of the five dis-"senting; but the manner in which it was argued, not at all the "necessities of the case, induced the Chief Justice to say, that, "'if at any time the public safety should require the suspension "'of the powers vested by this act, in the Courts of the United "'States, it is for the Legislature to say so. That question de-"'pends on political considerations, on which the Legislaure is to "'decide. Until the Legislative will be expressed, this Court can "'only see its duty, and must obey the laws.'" 4 *Cranch, p.* 101, *Ex parte Bollman and Swartwout.*

But the Court was not divided upon *this* question, for Johnson J., who delivered the dissenting opinion, did not express his dissent from the view of the Chief Justice as to the necessity of *Legislative* action to suspend the privilege of the Habeas Corpus, and, indeed, did not advert to that branch of the question.

In the same case, on page 95, occurs also the significant language of C. J. Marshall, who, after quoting verbatim the Constitutional provision in regard to the suspension of the Writ, says: "Acting under the immediate influence of this injunction, they "(the first Congress) must have felt with peculiar force the obli-"gation of providing efficient means by which this great Consti-"tutional privilege should receive life and activity; for if the "means be not in existence the privilege itself would be lost, "*although no law for its suspension should be enacted.*" (The italics are not in the Report.)

The language of both these passages is so clear as to leave no doubt as to the *meaning* of the Court, and scarcely to warrant the shade cast upon it by Mr. Binney, when, in regard to the quotation from 4 Cranch, 101, he uses the words, "*Whatever* was the Chief Justice's meaning."

Here it must be conceded that the direct question was not *technically* before the Court, that is to say, the question whether the power of suspending the privilege of the Writ was derived from the Constitution to the *Executive* or *Legislative* branches of Government. When the case is attentively looked at, however, it must surely be considered a very high authority; not so high, perhaps, as if it had been the *very* point in controversy, but only less than that by a technical shade of subordination, and vastly superior to all attempts to confute it, which have not the sanction

of the direct action of the Court upon the point. No such case occurs, and hence the force of the lucid words of C. J. Marshall.

It is also worthy of remark that besides the habitual care of C. J. Marshall in adhering to the matter technically before him, we have in this case evidence that he gave to the whole subject especial consideration. A note at foot of page 75, 4 Cranch, is as follows:—

"Marshall, C. J.—The whole subject will be taken up *de novo* "without reference to precedents. It is the wish of the Court to "have the motion made in a more solemn manner to-morrow, when "you may come prepared to take up the whole ground."

It was, doubtless, on account of this intimation from the Court that the point was argued and ultimately decided. If this opinion is an *obiter dictum*, it has as few of the infirmities of a question collateral to the point in controversy, as any to be found in the books.

But it is possible for an *obiter dictum*, by successive fusions through high legal minds, to attain a still higher rank as an authority, and such was the case with the opinion just cited, which was quoted with approbation by Judge Story in his Commentaries, Vol. III., Section 1336.

But why are we told that "Chief Justice Taney's opinion in Merryman's case" is not an authority? Hitherto Mr. Binney has been dealing with cases which he has set aside, because he considers them *obiter dicta*. The opinions of C. J. Marshall and of Judge Story, to say nothing of Mr. Jefferson, are *obiter dicta*, but when we come to that of Chief Justice Taney, where the very point was raised and decided, we are told it is "*not* an authority." It seems plain that the real objection to the former opinions is not that the point decided was collateral, or the learned author would have been better pleased with Merryman's case, which supplied all that was wanting to make the preceding cases complete. What elements of authority does Merryman's case lack? The judicial officer was the Chief Justice of the United States—at the head of the Judiciary of the country—the peer in every respect of the Executive, and the mouth-piece of the Court whose interpretation of the law it was the sworn duty of the President to respect, and to see faithfully executed. The case was decided with deliberation, and the Chief Justice forbore an oral opinion, saying he would prepare one in writing and file it of record—and he did so.

The case was not one which admitted elaborate argument. The respondent was represented by a military officer—one of his aids—who, having read a written return, in reply to a question by the Chief Justice, as to whether he had "brought with him the body "of John Merryman," said, he had no instructions but to read

the return, and retired. That return, among other things, recited that the relator had been charged with various acts of treason, &c., that the respondent had been "duly authorized by the President "of the United States, in such cases, to suspend the Writ of "Habeas Corpus for the public safety."

If it is not an authority, because it was a decision of a single Judge, the answer is, that such is the usual course. The decision being in favor of the relator, he could do nothing more; the execution of the attachment, duly issued by the Chief Justice, was, of course, a mere form; the officer bearing it was denied admission to the garrisoned fortress in which the applicant was held. The arm of the law was paralyzed, and remains so to this day. The offence charged, to wit, *treason*, was one specially cognizable by the *civil* tribunals.

It is said, the opinion of the Chief Justice in this case "has "a tone, not to say a ring, of disaffection to the President, and to "the Northern and Western side of his house;" but this, it is candidly admitted, "may be the apprehensiveness of the reader." It is not improbable that this emotion of apprehensiveness, or the degree of it, may depend somewhat on the *political complexion* of the reader, to which the smouldering enmities of the past may have lent a darker hue. Viewed from the extreme of either side of politics, "apprehensiveness" might attribute disaffection to either the Chief Justice for granting the writ, or to the President for setting it at defiance. No political warp should be permitted to obtrude itself upon the question, and a careful examination of the Chief Justice's opinion, in this case, will fail to discover any taint of political or personal bias in it. Whether the opinion be an elaborate depreciation of the President's office may also be a *political* question. The Marshal's posse is the civil arm of Government, and that arm must, by our laws, dominate over the military, until the people, through their representatives, regularly surrender the civil to the military power. Until this be done, (and *yet* it has not been done,) the Marshal's posse is the only legal mode of enforcing the mandate of the law. This posse may, or may not be armed, as the necessities of the case demand; but whether armed or not, it is under the control of the law.

The great question, then, to be considered is, whether the people of this country enjoy the privileges and immunities of freemen, by the grace of the Legislature or of the Executive; and here an argument is offered that because the Executive is the officer of Government charged by the Constitution with the duty of seeing that the laws be executed, he, therefore, should also have the power of summarily disposing of such persons as, *in his opinion*, interfere with such execution. If this proposition be true,

the people hold their liberties in the irresponsible power of one man—the power is irresponsible, because, if the *denial* of the Writ be the result of an honest conviction on the part of the President as to the existence of the constitutional conditions, the risk of impeachment would not be encountered. For one instance of dishonesty or malignity on the part of the Executive, the infirmities of nature and of human judgment tell us there will be many of honest error and misconception, and it is this liability which magnifies the peril of the doctrine. Certain it is, that the Executive is charged with the execution of the laws, and that to his office are first perceptible the agencies by which their due execution is obstructed; but it is equally certain that one of the laws he is sworn to execute, is that high law, the benefit of which is, by the Constitution, secured to the citizen, unless in the excepted "cases of rebellion and invasion, and when the public "safety may require it." Who is to judge, then, of the existence of these conditions? Upon whose judgment rests the responsibility of abridging or denying the freedom of the person? The question of personal liberty is in no way affected by the act of Congress of 1795, under which the President called out the military in April last, although a subtle attempt is made to connect them. That act was passed under authority given to Congress by the Constitution. Without the voice of the people thus expressed, the President would have been powerless in the condition of affairs to which the act applies. The case of Martin *vs.* Mott, 12 Wheaton, arose under this act, and like it, has no connection with the question as to the right of the President to interfere with personal liberty. If the President were absolutely without the power to obtain the assistance of the Legislature, the case might be less clear; but the Constitution provides that "He "may, on extraordinary occasions, convene both Houses, or either "of them, and in case of disagreement between them, as to the "time of adjournment, he may adjourn them to such time as he "shall think proper." This provision, then, gives him a summary power to convene the Legislature. The question as to whether the occasion be "extraordinary" is for the President alone; and if resolved in the affirmative, he has the right, and it is his duty, to call to his aid the Supreme Council of the Nation.

Mr. Binney quotes with approbation the argument of Mr. Hamilton, in No. 74 of the Federalist, and says, "The whole of "the paragraph is as applicable to the power of arrest and deten-"tion in time of rebellion as it is to the power of pardon." It is respectfully submitted that there is no parallel between the cases. The one is an act of *mercy*, whose function is to *liberate*, while the other is an act of *rigor*, which *restrains* the person. A glance at

the argument of Mr. Hamilton will show that this distinction was obvious then, as now. Speaking of the clause in the Constitution wherein the President is authorized "To grant reprieves and par-"dons for offences against the United States, except in cases "of impeachment," Mr. Hamilton says: "Humanity and good "policy conspire to dictate that the benign prerogative of par-"doning shall be as little as possible fettered or embarrassed," &c. And again, he says: "On these accounts one man appears to be a "more eligible dispenser of the mercy of Government than a body "of men." And by fair inference, the argument would be, that, when the act is *not one of mercy*, but of *severity*, and possibly of *tyranny*, a body of men, such as the Congress, are safer depositories of the power than is one man. There are many other considerations which lead the judgment to the same conclusion as to the inapplicability of Mr. Hamilton's doctrine to a case in which the discretion of one man may be used to curtail or deny the liberty of a citizen.

But Mr. Hamilton has elsewhere in the Federalist, (No. 69,) left us his views as to the power of the President as compared to that of the British sovereign, and after naming the powers of the President, (omitting any mention of a power to suspend the privilege of the Writ,) and the powers of the British King in parallel cases, concludes that in all cases the power of the former is the weaker.

Again, in the 84th number of the same book, in speaking of the Writ of Habeas Corpus, the same writer refers with approbation to Blackstone, and, treating the Constitutional clause as one of the instances in which that instrument is a *Bill of Rights*, seems throughout to be impressed by British analogies, as applicable to the Writ under the Constitution. Indeed, the British writ, British law and British analogies had completely saturated the public mind of 1787 with their doctrines, and these modes of treating the subject have never, until recently, been disturbed by a doubt. Whether we search our own history, or that of other free governments, the view in defence of which Mr. Binney's pamphlet was written appears to be exceptional.

The Writ of Habeas Corpus has been disregarded in England, but the instances have always been considered as usurpations; and in one remarkable case, the Sovereign confessed that he had violated the law. William III. apologized to the Commons, saying he had been compelled to trespass on the law of England, and asked their advice, which was given in an Act of Parliament practically suspending the Writ for a limited time. In this country the Legislature has given no similar sanction, nor has the action of that body been invoked in the matter.

Mr. Binney, on page 10, tells us that Blackstone speaks of "suspending the Habeas Corpus Act for a short or limited time," and says, "in fact the Habeas Corpus Act of England has never been "suspended for a moment. He spoke loosely and inaccurately." Now this may be technically correct, because a general suspension would have included offenders of all kinds, which is not pretended; but practically and naturally, *the Writ has been suspended.* The fair inference to be drawn from Mr. Binney's fling at Blackstone is, that no Act of Parliament had ever been passed which practically denied the privilege to any one. We find in 1 W. and M., Cap. II. that an Act was passed, "empowering his Majesty to ap-"prehend and detain such persons as he shall find just cause to "suspect are conspiring against the Government." This Act expired by limitation on the 17th April of the same year, and was afterwards twice renewed. The precise words of these Acts are not known to the writer, as the title alone is given in the British Statutes at large; but whether the exact phrase negatived, be or be not used is a matter of indifference. The Earl of Arran, Sir Robert Hamilton, and others, were detained in the Tower without the benefit of the Writ, and this benefit they were deprived of by virtue of the Acts of Parliament alluded to. It might with more accuracy be denied that the Writ had been suspended in this country. No Act of Congress has been passed on any subject kindred to suspension, nor has any public order suspending the Writ of Habeas Corpus been issued by the President; and yet, in the absence of these, (which the English precedents supply,) one who should speak of the Writ being suspended in this country, in regard to certain persons, could not with any propriety be said to be speaking *loosely* and *inaccurately.* The letter of the American Secretary of State to Lord Lyons, dated October 14, 1861, is believed to contain the only official information on the subject. The British Acts were regarded as *suspensions* by historians; and Mr. Binney himself, on page 54, speaks of them as "Suspension Acts." Smollett says the King was empowered by "a bill to dispense with the Habeas Corpus Act," while another historian uses the phrase "a bill for the suspension," &c. The Writ of Habeas Corpus was again suspended in 1696, and on this occasion also, the specific words are used by Lord Macaulay in the twenty-first chapter of his history, in which, speaking of two important bills which were brought in, in one day, he says, "by one the Habeas Corpus Act "was suspended." So much for the case, if Blackstone had used the words in the sense imputed to him; but it seems he does *not.*

His words in III. Com., page 136, are these:

"The legislative power, whenever it sees proper, can authorize "the Crown, by suspending the Habeas Corpus Act for a short

"and limited time, to imprison certain suspected persons without "giving any reason for so doing." But here he does not say the Legislature has *used* the power, although if he had so said, (and this is the import of the passage on page 10,) the instances given show he would have been correct.

After this statement, we confidently leave the propriety of the charge against Blackstone to the judgment of the reader.

But the pith of the whole matter is contained in the following sentence of Mr. Binney: "It is further objected that this is a "most dangerous power. It is fortunately confined to dangerous "times; in such times the people generally are willing, and are "often compelled to give up, for a season, a portion of their free-"dom, to preserve the rest; and fortunately again, it is that portion "of the people, for the most part, who like to live on the margin "of disobedience to the laws, whose freedom is most in danger."

This paragraph shows a feeling of disaffection for the *Southern* side of the house, quite as strong as that imputed to Chief Justice Taney in regard to the opposite cardinal point.

In dangerous times the people may be willing to part with a portion of their freedom, but such a loss must be in the discretion of their Representatives; then the deprivation can be endured; but it is not bearable that this discretion should be in the breast of one man. It is not to be tolerated that on the mere opinion of an individual, however high his position, as to the loyalty or disloyalty of a citizen, the latter can be deprived of his liberty. We see how readily this pernicious doctrine warps other Constitutional guarantees of liberty to its ends, and draws kindred principles into its vicious society. Whatever may be the correct doctrine as to the Constitutional depository of the power of suspending the Writ of Habeas Corpus, there are other guarantees of liberty in the Bill of Rights and in our Constitution, which are absolutely *beyond* the reach of suspension, except by a power which could destroy or change the organic law itself; and yet, this check has not been sufficient to save them to the people. These guarantees have been ignored as fully as if they never existed, and for this has been advanced the plea of necessity. But in the Book of Constitutional freedom there is no such word as necessity, unless *under* the law. A principle of freedom once surrendered, is practically useless afterwards. The precedent is ever ready in the mouth of power, and human nature and experience tell us it will be used. The people of this country have enjoyed, hitherto, so much liberty that they are not sensitive or anxious upon the subject. While in other countries of large and dependent populations, these principles are protected as of delicate hot-house growth, in this happy land the strong plant of freedom sprouts spontaneously, and reaches its

hardy maturity without care or culture. The essential principles of personal liberty appear to have existed even among the Roman pagans, for we find them well embodied in the memorable words of Festus to Agrippa: "*For it seemeth to me unreasonable to send a "prisoner, and not withal to signify the crimes laid against him.*"

To return, therefore. How is the danger of impeachment to act as a check upon the abuse of the power? The same Executive, whose conduct was to be the subject of examination, can lay fast the movers of an impeachment, and stifle investigation. It is only necessary that he should be of opinion that there is a *rebellion or invasion.* Convinced of one or the other of these conditions, the result that "the public safety requires it" is the necessary consequence. His own safety he may think that of the public, and the transition to the maxim, *L'Etat c'est moi*, and to the *lettres de cachet*, and the Bastilles of the same period of history is tempting and dangerous.

But, when we are told, on page 23, that, "for sixty years it "has been beyond any sensible man's power of face to profess" jealousy of the Executive office "gravely," Mr. Binney forgets the distinguished part he took in Congress, in 1834, against what he then considered a stretch of Presidential power; and he singularly also overlooks the eloquence of Mr. Webster, Mr. Clay, and Mr. McDuffie on the same side and occasion. The battle cry of the strong opposition to President Jackson, in 1834, was *Executive usurpation;* and it is amazing that one who, like Mr. Binney, was prominent in those scenes, should so far distort the page of history as to pen the sentence above quoted.*

The Secretary of State has astonished the people of this country as to the extent to which the "privilege of the Writ of Habeas "Corpus" has been suspended. In the correspondence between the British Government and that of the United States, the letter of the American Secretary of State to Lord Lyons, under date of October 14th, 1861, informs the latter, that under the Constitu-

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* If it be desired to pursue this subject further, reference may be had to the files of the United States Gazette, of 25th October, 1832, where, Mr. Binney, speaking (and we are bound to suppose with gravity) against Executive encroachments, says: "The little finger of Presidential nullification is thicker than "the loins of South Carolina. *This* is a nullification by States, and difficult as it "is to understand, has, at least, some dignity about it; but *that* is nullification "by every man in the United States who is able to take an oath of office."

Mr. Webster said, in his speech on Jackson's protest: "The contest for ages "has been to rescue liberty from the grasp of Executive power." * * * "I will "not acquiesce in the reversal of all just ideas of Government. I will not de-"grade the character of popular representation. I will not blindly confide where "all experience admonishes to be jealous. *I will not trust Executive power, vested "in a single magistrate, to keep the vigils of liberty.*" And more of the same speech, and others of that date, might well be added.

tion, "The President of the United States is invested with the "whole Executive power of the Government, and charged with "the supreme direction of all municipal or ministerial civil "agents, as well as of the whole land and naval forces of the "Union, and that, invested with those ample powers, he is "charged by the Constitution and laws, with the absolute duty "of suppressing insurrection, as well as preventing and repelling "invasion, and that for these purposes, he constitutionally exer-"cises the right of suspending the Writ of Habeas Corpus, when-"ever and wheresoever, and in whatever extent, the public safety "endangered by treason or invasion in arms, in his judgment re-"quires." And again: "The proceedings of which the British "Government complains, (the suspension of the Writ of Habeas "Corpus,) were taken upon information conveyed to the President "by legal police authorities of the country, and they were not "instituted until after he had suspended the great Writ of free-"dom, in just the extent that, in view of the perils of the State, "he deemed necessary. The military officer charged with their "custody (the suspected persons) has declined to pay obedience to "the Writ of *Habeas Corpus*, but the refusal was made in obe-"dience to the express direction of the President, when he exer-"cised his functions as Commander-in-Chief of all the land and "naval forces of the United States."

The resolution of the House of Representatives, of July 12, 1861, asks the Attorney General for—

First—A copy of his opinion "mentioned in the message of the "President to this House at the opening of its present session."

Second—"A copy of the order suspending the Writ of Habeas "Corpus."

To this latter request the Attorney General answers, on the 13th of July, 1861:—

"As there is no such order in the records or files of my office, "I have ventured to request the Secretary of State to fulfil the "pleasure of the honorable House in that particular."

Here it may be worthy of remark that the request is for the "order suspending the Writ," not the "*privilege*" of the Writ. The House was evidently not familiar with any distinction between the two forms of expression, or, which is more probable, considered them identical.

Neither Congress nor the Executive has *formally* suspended the Writ. The Judges of our Courts continue to issue it, and proceed under it, in due course of law, (if we except the extraordinary action in the case of Judge Merrick,) until interrupted by the mandate of the Government, or the remedy is practically annulled by military resistance. Each case is a separate suspen-

sion. No class of persons or cases has been authoritatively indicated as proper to come within the Executive discretion.

Mr. Binney, to the four cases which he instances, in which different views on this subject have been manifested, might add more. Some of them are ludicrous. One writer in a daily journal maintained that the privilege of the Writ had *never* been suspended by the Executive, as the Writ was still purchasable by any one who had the money to pay for it and the oath to make for it. Be the result as it might, the citizen had the inestimable right of setting the machinery of law in motion and paying for the motive power, with the conviction that it would not advance him on his journey. This is a novel view of the *privilege* of a writ.

Apart from the question as to the *Department* of Government in which the power of suspending the Writ is lodged, and applicable to either view that may be taken of it, is the important inquiry as to what should be the *operation* of suspension? Shall it be a suspension within certain geographical limits, or shall it be irrespective of such considerations, and apply to persons in suspected classes, or, going a step lower, to individuals without regard to class or district? As the suspension has been practiced lately, the latter seems to be the mode adopted. Bad, then, as the new doctrine of the power of the Executive may be, it is made worse by the mode in which it is exercised—a mode which could not have been adopted had the suspension been by act of Congress, unless the act had delegated the discretion to the Executive, in which case it would probably have defined the boundaries within which it was to be exercised.

When the Legislature has suspended the Writ in regard to a district, all who are within the tainted limits have notice of what may be the consequence of living on the "margin of disobedience;" such border residents are informed of the slippery nature of the soil they occupy. Where unlimited discretion is lodged in the Executive, this "margin of disobedience" may vary in area, as fancy, passion, or prejudice may suggest. When the authority to suspend the Writ is derived to the Executive from the Legislature, it is proper and usual to announce the fact of suspension by proclamation, which should recite the statute giving the authority. Nothing of this kind has been done. The Writ *is* suspended for one, and it is *not* suspended for another. Two men shall be living on this unhappy *margin*. One shall be taken, and the other left. When the Government is tired of the prisoner, he is thrust out, with no more reason for the ejection than he vainly expected for his capture. He asks on whose oath he is put into an armed fortress? He fancies he has somewhere heard of a right to meet his

accusers face to face, and so forth. He is met with a grim, soldier-like refusal, retires to his casemate with an uneasy notion that he has entirely misunderstood free institutions, and is startled during the night by the ghost of the Bill of Rights.

But the great question comes, sooner or later, back to this:—What was in the minds of those who framed the Constitution of the United States when they inserted the Habeas Corpus clause? Of what were they thinking? Was it of that great principle of human liberty which was ancient and time-honored even when Magna Charta was conceded, and which, so far as its vital principle is concerned, has received no accession of vigor from all the declaratory enactments since made? Or was it some new-fangled idea which they embodied in the supposed loose phraseology of "*suspending the privilege of the Writ?*" Kindred to this question, and a part of it, is the inquiry into the view which the STATES took of the authority necessary to suspend the Writ. The delegates to the Convention of 1787 carried with them whatever was the prevailing sentiment of their constituencies upon this subject, and subsequently, when the Constitution came up for ratification, each State as a unit, treated the clause as a recognition by the Federal Government of a principle of liberty with which each was, by the common law and its own local government, familiar. This principle was strengthened in the Constitution by limiting expressly the conditions under which the Writ could be suspended to "*cases of rebellion or invasion, when the public safety might require it.*" In the States there were no such conditions. The Bill of Rights, which was applicable to the Colonies, simply declared that no power of suspending laws should be exercised except by the *Legislature* or its authority, and this language has been transferred to the State Constitutions adopted since 1789. The Constitution thus *enlarged* the circle of liberty by affixing conditions upon its restraint which were wholly unknown to the States ratifying, but which, as has been said, they afterwards approved and adopted.

Turn, then, as we will, we are beset by "English analogies," and nothing has occurred to disturb their application to the Habeas Corpus clause, and all other guarantees of the Bill of Rights, until the late misfortunes of the country have given birth to the new doctrine. Indeed, Mr. Binney, having disposed of that mode of stating his question which would be governed by "English analogies," to wit, the merely "legal and artificial mode," is constantly beset by these same analogies in his examination of the "Constitutional and natural" view of the subject. He cannot escape from this ever-present disturbance of his conclusions under the second head. The spirit that he endeavored to lay is constantly

obtruding its unwelcomed presence, only to be again ineffectually exorcised.

In regard to the support given to the action of the President by the opinion of his Attorney General, Mr. Binney wisely offers no remark. He does not include it in his introductory pages, which seem to be confined to the opinions of "writers in our journals," and he subsequently dismisses it, saying it is not his purpose "to "affirm or reject the argument of the Attorney General." That opinion, however, presents some novelties which we may pause to examine. The first question presented to the Attorney General is, "In the present time of a great and dangerous insurrection, has the "President the discretionary power to cause to be arrested and "held in custody persons known to have criminal intercourse with "the insurgents, or persons against whom there is probable cause "of suspicion?" This question is without qualification, answered in the affirmative.—"*Probable cause of suspicion!*" These are odd words to the "legal and artificial" ear, and remind one of the phrase "*suspected of being suspected.*"

The Attorney General could not have had the framing of the question he was about to answer, or he would have avoided this form of expression. "Probable cause" is the conclusion of *guilt*, (not suspicion,) arising from facts, *proved under oath or affirmation.* It is such a state of facts, *sworn* to, as a careful and prudent man would consider prima facie evidence of *guilt.* It is no crime or misdemeanor *to be suspected*, and if the "*probable cause*" should contain, under oath, a state of facts so convincing as to leave with the magistrate no doubt of guilt, what then? The defendant is liable to *suspicion—is suspected.* Really, this is too much.

But the Attorney General, either intentionally or otherwise, has contrived to answer the first question put more thoroughly than was expected of him. He was merely asked as to the power of the President "to *cause* to be arrested," and in his answer, he speaks of *the power to arrest.* There is a wide difference between the phrases. Had the question put been amply affirmed, and the word "*suspicion*" at the end, changed to "*guilt*," we should have had no great accession to our stock of information from the answer of the Attorney General. The question, with the verbal correction offered above, could as safely be affirmed of any private citizen, as of the President. It contains nothing inconsistent with the due

course of law. It does not enquire as to the right to hold *without bail.*

But "*the power to arrest*" (as the Attorney General has kindly answered the question) is another thing; the cases that led to the inquiry had *not* been proceeded in, in due course of law, as was well known. The answer, by changing the phraseology of the question, boldly attempts to cover the cases which produced it, although those cases were not literally included in the enquiry.

Whatever may be the difference of view in regard to suspending the Writ of Habeas Corpus, there can be no doubt that neither the President nor any member of his Cabinet has power to sign a warrant either with or without an oath. An oath would not help the matter, because they have no judicial or magisterial power to take cognizance of facts under oath, and, *under the law*, a warrant so signed would be mere waste of paper.

In the same opinion, the peculiarity of the oath of the President is also noticed. When he swears "to preserve, protect and de-"fend" the Constitution, the oath is said to imply "the power to "perform what he is, in so solemn a manner, required to under-"take," and then the Constitutional injunction that he "shall "take care that the laws be faithfully executed," is supposed to supply any omissions in the oath, and make him the preserver, protector, and defender of the Constitution, and *so* he should be.

This is the Jesuitism of the day—to countenance a positive wrong, for a problematical and speculative result of good. The observation of the Attorney General begs the whole question, and revives the exploded doctrine that power flows from the peculiarity of the Presidential oath, as was contended by Jackson and his supporters in regard to the Bank of the United States, in 1834. The question simply is—What is this Constitution, and what are those laws of which the President is the preserver, protector, and defender?

It is worthy of remark that the Attorney General, though he reaches the same result attained by Mr. Binney, does it by the "English analogy" route. After quoting Blackstone at length, he concludes, on page 11 of the opinion: "Such is the Writ of "Habeas Corpus of which the Constitution declares the privilege "thereof shall not be suspended except when, in cases of rebellion "or invasion, the public safety may require it."

He also quotes Chief Justice Marshall's words in *ex parte* Bollman, but his objection is not that they were *obiter dicta*, but merely "that the Constitution is older than the Judiciary Act." This proposition is as novel as it is indisputable.

The Constitution went into operation on the first Wednesday of March, 1789; the Judiciary Act was passed about six months

afterwards. It is not easy to see how it could have been *older* than the Constitution, since it is the *creature* of it; and yet, the same political vision which has recently discovered that the Constitution is older than any of the States, might have little difficulty in inverting the order of nature in this respect. Congress, by the Judiciary Act, merely authorize the Supreme and other Courts to give *effect* to this privilege, and did so by a grant of power to issue this Writ among others. The Federal Courts have no common law jurisdiction, though they proceed in such jurisdiction as is granted to them by the Act, according to the *course* of the common law; therefore, but for this clause in the Judiciary Act, the privilege of the Writ of Habeas Corpus in the United States Courts would have been nothing, for want of the power in these Courts to issue, and proceed under, that Writ.

But this is *not* true of the State Courts, most of which are of common law jurisdiction, and they, without express grant of power from the Legislature, would, by their very nature, have authority to issue the Writ, until that authority was expressly withdrawn by the Legislature. It was, without doubt, this common law privilege of the Writ which pervaded the minds of the Convention of 1787. At that time there was no portion of the United States which was exclusively under the control of the Federal power. The laws of the United States did not exclude the operation of the State laws in the District of Columbia prior to the year 1800.

The case of Luther *vs.* Borden, 7 Howard, has been erroneously cited as an authority in favor of the course pursued by the President in suspending the Writ. But it has no analogy to it. The strong point of difference being that, in that case, there was an Act of Assembly to justify the trespass complained of; while here, no Legislative authority either Federal or State is pretended. Luther *vs.* Borden, presented for revision the action of the inferior Court in excluding certain evidence, the tendency of which was political, and as such not properly the subject of review by the Supreme Court, and on this ground mainly the decision below was affirmed. The question, in one aspect, was, which of two parties in a State had a political existence as a government. It did not necessarily involve a consideration of the constitutionality of the act of either. So far as this case may be taken as an authority for the power of a State to declare "martial law," in its widest sense, it is not satisfactory. But this was not a point regularly raised. The Chief Justice seems to have thought that martial law of a milder type than that which is generally understood by the term, might exist by the authority of a State Legislature, and doubtless considered such to be the meaning of the Rhode Island statute when

he says, "No more force, however, can be used than is necessary "to accomplish the object, and if the power is exercised for the "purposes of oppression, or any injury wilfully done to persons "or property, the party by whom, or by whose order, it is com-"mitted, would undoubtedly be answerable." These conditions mitigate very much the terrors of martial law, but are of little practical avail against the sword. They show, however, that absolute and exclusive military dominion was not adverted to by the Chief Justice. The opinion of Judge Woodbury, dissenting solely on this question of martial law, contains that view of the subject most in accordance with our institutions.

The Attorney General tells us, "it is not very important whether "we call a particular power exercised by the President, a peace "power or a war power—he rules in peace and commands in war, "and at this moment he is in the full exercise of all the functions "belonging to both those characters." Here is the cloven foot again. Why, at this moment, has the President more power than at any other? It was wise to put the civil and military arms upon the same body, the military being the weaker member. But the civil power is the *strong right arm;* its functions cannot cease nor its vigor be paralyzed, without the approving voice of the people or their representatives. What does the doctrine lead to? Simply to this, that the President is to judge how much of the peace power he will exercise, and how much of the war power.

But the whole reasoning of the Attorney General is so loose that it is painful to follow him. He finds a resemblance between a Writ of Replevin and a Habeas Corpus. Arms for the enemy, he thinks, are as much entitled to a Writ of Replevin, as is a person, against whom there is "probable cause of suspicion," entitled to a Habeas Corpus!

It is no answer to any of the objections of the preceding pages to say that the present is an anomalous and exceptional period, and that during such days the fundamental law may be strained to suit an emergency without peril. It is for precisely such occasions that Constitutions and laws are made. They are garbs of freedom to be perpetually worn. They cannot be laid aside except by revolution. They are worthless if they will not endure the strain for which they were made. "The saving of the National life" is a great and glorious object, but that saving must be done *under* and by *virtue* of the law. *Outside* or *above* the law there can be

no health. Milton puts the word NECESSITY into an apt mouth when he says:

> "So spake the fiend, and with necessity,
> The tyrant's plea, excused his devilish deeds."

and it is still the shibboleth of the descendants of the Prince of Darkness.

The logic by which some people reach the contrary result resembles the crochet of Bishop Warburton, and applied to our case would read thus: Every well regulated government should contain within itself the means of its own conservation. The United States is a well regulated Government; *therefore* the United States has the powers predicated in the major of all good governments. A simple proposition in *barbara*, to the support of which, in regard to the Government of Moses, Bishop Warburton dedicated three volumes, and beyond much classical research, accomplished nothing but making his syllogism ridiculous.

It has been attempted to justify this arbitrary exercise of power under the maxim, *Salus populi suprema lex*, but this maxim has been wholly misapplied, and if applicable to the present case, the sense in which it is used is improper. Its true application is to a case in which private *property* is taken for some object of public utility, which can be authorized *only* by the Legislature. It does not apply to a case in which *personal* liberty has been restrained. If applied, however, to such a case, the question but recurs, *who* shall judge of that safety? *who* shall say what is the *supreme law?* If that discretion be lodged with *one* man, whether he be King or President, the maxim is the equivalent of that other, so deservedly odious, "*Quod Principi placuit legis vigorem habet.*"

The people have got along, thus far, contented with the "English analogies" on questions of personal liberty. They have lived under them *here* for seventy years, and in the persons of their ancestors from time immemorial. It is not necessary to shake the pillars of the temple to accommodate its interior to the fancies of a new and transitory occupant.

We are told, "The office itself is a short taper, which shines not "very brightly for a brief term, and then goes out of itself;" but the extent of a conflagration is not dependent on either the length or the brilliancy of the taper.

The people had reluctantly yielded to the apparent necessities of the case, and all, but the victims, had forgotten the recent suspension of the Writ. The events of the day are too grand to notice individual hardships. The pamphlet of Mr. Binney has re-opened the wound, and its tendency may well be regarded as

more dangerous and revolutionary than that of any enemy the country has been called upon to encounter.

To conclude. Let the reader transport himself in fancy into the august presence of the framers of the Constitution. Let him go farther, and, tracing the stream of liberty from its source in remote days, walk by its broadening banks. Let him ask of Magna Charta, and all the tributary waters of statute and precedent, "*What is the principle which has made the torrent so "mighty?*" Coming down to the days of the Western Giant—the very child of liberty—let him demand whether this strong son will disown his long lineage, and renounce the faith of his ancestors? If he be ready for such apostacy, let the people ponder well the sad reply.

PHILADELPHIA, *February* 10*th*, 1862.

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